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Human rights and unilateral coercive measures

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report prepared by the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights, submitted in accordance with Human Rights Council resolution 27/21.

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Report of the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy

Summary

The present report focuses on issues of remedies and redress for victims of unilateral coercive measures, as mandated by Human Rights Council resolution 30/2 and General Assembly resolution 70/151. The topic is examined from a conceptual point of view, including a review of the conceptual aspects of remedies for violations of human rights caused by unilateral coercive measures in general international law, in international human rights law and in international humanitarian law. The report is to be read in conjunction with the report that the Special Rapporteur has submitted to the thirty-third session of the Human Rights Council (A/HRC/33/48), which presents a preliminary review and evaluation of the various mechanisms actually (or potentially) available to States and to individuals affected by unilateral coercive measures to seek remedy and redress.

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I. Introduction

1. The present report is submitted by the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights to the General Assembly, in accordance with resolution 30/2 of the Human Rights Council and resolution 70/151 of the General Assembly.

2. In its resolution 30/2, adopted on 1 October 2015, the Human Rights Council requested the Special Rapporteur "to focus on the negative impact of unilateral coercive measures on the enjoyment of human rights of victims and to address the issues of remedies and redress with a view to promoting accountability and reparations in his next reports to the Human Rights Council and the General Assembly". In its resolution 70/151, adopted on 17 December 2015, the General Assembly also requested the Special Rapporteur to submit an interim report on the implementation of resolution 70/151 and on the negative impact of unilateral coercive measures on the enjoyment of human rights of victims and the issues of remedies and redress.

3. The present report is in line with the mandate of the Special Rapporteur, which, pursuant to resolution 27/21 of the Human Rights Council, extends, inter alia, to the making of "guidelines and recommendations on ways and means to prevent, minimize and redress the adverse impact of unilateral coercive measures on human rights" and of "an overall review of independent mechanisms to assess unilateral coercive measures to promote accountability".

4. The present report is to be read in conjunction with the report that the Special Rapporteur has submitted to the thirty-third session of the Human Rights Council (A/HRC/33/48). In that report, the Special Rapporteur has listed the key activities carried out under his mandate between July 2015 and June 2016. He has also addressed the issues of remedies and redress for victims of unilateral coercive measures, through a preliminary review, assessment and evaluation of the various mechanisms available to victims.

II. Scope of the study

5. The Special Rapporteur wishes to emphasize at the outset that, given the complexity of the topics addressed by the present report and their multifaceted and intricate aspects, the findings set out in the present report and the recommendations formulated are preliminary and tentative. Such findings and recommendations are therefore to be supplemented at a later stage of the mandate. The Special Rapporteur welcomes in advance all comments, relevant information and suggestions that Governments, non-governmental organizations and any other interested parties may have regarding remedies and redress in relation to the negative impact of unilateral coercive measures on human rights.

6. For the sake of clarity and efficiency, the Special Rapporteur decided to address the issues of remedies and redress for unilateral coercive measures from two different angles, corresponding to his two annual reports. In the present report, the topic is examined mostly from a conceptual viewpoint, i.e. a review of the conceptual aspects of remedies for violations of human rights caused by unilateral coercive measures in general international law, in international human rights law and in international humanitarian law. In the report submitted to the thirty-third

session of the Human Rights Council, the Special Rapporteur addressed the topic from a procedural perspective, i.e. with a focus on the various mechanisms actually (or potentially) available to States affected by unilateral coercive measures and to individuals who are victims of unilateral coercive measures. He has thus reviewed and evaluated the remedies available to States under the Charter of the United Nations and under dispute settlement mechanisms and forums such as the International Court of Justice, inter-State arbitration and the dispute settlement system of the World Trade Organization. He has also covered remedies available to individuals and entities affected by unilateral coercive measures, i.e. domestic remedies and remedies actually or potentially available through human rights bodies, claims commissions and regional or international courts.

7. The concepts of remedies, redress, accountability and reparation that are the focus of the present report need some preliminary clarifications. **Remedies** are generally considered to embody two separate meanings:

> "In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant".[1]

8. **Redress** usually refers to the substantive remedies afforded victims of violations. In that meaning remedies and redress can be used interchangeably, as "the range of measures that may be taken in response to an actual or threatened violation of human rights".[2]

9. **Accountability** in the context of international law refers to a range of mechanisms through which international actors may be held responsible for the violation of certain rules. The following definition has been proposed:

> "International legal accountability involves the legal justification of an international actor's performance vis-à-vis others, the assessment or judgment of that performance against international legal standards, and the possible imposition of consequences if the actor fails to live up to applicable legal standards".[3]

10. Against that background, the concept of **reparation**, commonly used in the law of international responsibility in the context of inter-State claims (or claims involving States and international organizations) appears as one of the legal mechanisms designed to ensure accountability in inter-State relations or relations between States and international organizations.

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[1] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 2015).

[2] Ibid.

[3] Jutta Brunnée, "International legal accountability through the lens of the law of State responsibility" in *Netherlands Yearbook of International Law*, vol. 36, No. 1, R. A. Wessel and W. J. M. van Genugten, eds. (2005).

III. Remedies for violations of human rights caused by unilateral coercive measures: a conceptual framework

A. Remedies in general international law: the law of international responsibility

11. Unilateral coercive measures cannot avail themselves of the authority of the Security Council, which is precisely what makes them "unilateral" as opposed to "multilateral" (see A/HRC/30/45 and A/HRC/28/740), and as a consequence cannot be legally justified under the legal framework of Chapter VII of the Charter of the United Nations. Under international law, unilateral coercive measures therefore require some other legal justification in order not to qualify as breaches of international law.[4] Put differently, to the extent that unilateral coercive measures should fit with the legal regime of "countermeasures", the intrinsic unlawfulness of unilateral coercive measures is precluded only as far as they qualify as a countermeasure taken against the targeted State.[5] That in turn implies that, in the event that States (or international organizations) resort to such sanctions without proper justification, their international responsibility could be engaged. As noted by the International Law Commission, a "State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment".[6] Such responsibility could also be engaged in a situation where, even acting with proper justification, States (or international organizations) are found to have disregarded legal preconditions for recourse to countermeasures, such as the proportionality and reversibility of the measures. It has been noted in that respect, considering economic sanctions, that:

> "If the peacetime measures of economic warfare are in violation of obligations of the acting State under international law and cannot be justified as countermeasures, they will engage the international responsibility of the State.

[4] See Antonios Tzanakopoulos, "Sanctions imposed unilaterally by the European Union: implications for the European Union's international responsibility", in *Economic Sanctions under International Law*, Ali Z. Marossi and Marisa R. Bassett, eds. (The Hague, T. M. C. Asser Press/Springer, 2015).

[5] See article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, (A/56/10): "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State...". For an application to the case of the sanctions applied in 2012 by the European Union and its member States against the Islamic Republic of Iran, see Pierre-Emmanuel Dupont, "Unilateral European sanctions as countermeasures: the case of the EU measures against Iran" in *Economic Sanctions and International Law*, Matthew Happold and Paul Eden, eds. (Oxford/Portland, Oregon, Hart Publishing, 2016).

[6] See commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts commentary on art. 49 (A/56/10). It has also been noted that, in case of sanctions, "[t]he lawfulness of the action on the international plane depends, in the first place, on the effective occurrence of the international wrongful act by the target State", Tarcisio Gazzini, "The normative element inherent in economic collective enforcement measures: United Nations and European Union practice" in *Les sanctions économiques en droit international/Economic sanctions in international law*, Linos-Alexandre Sicilianos and Laura Picchio Forlati, eds. (Leiden, Martinus Nijhoff, 2004).

They will thus themselves serve as grounds for resort to countermeasures or even self-defence by the injured State".[7]

12. The law of international responsibility of States (and of international organizations) could be very relevant in the context of the search for some degree of accountability for unlawful recourse to unilateral coercive measures. It could offer a remedy for the State affected and, indirectly, a form of remedy for its people or entities affected by the measures. However, such remedy appears quite limited, as it is not always possible for an affected State to bring a claim before an international forum, as no such forum may be available in the relations between the affected State and the targeting State(s) (or international organization). In practice claims brought by targeted States willing to challenge the application of unilateral coercive measures appear to be very rare. In the 1980s, Nicaragua challenged various hostile actions taken against it by the United States of America before the International Court of Justice, including the general embargo on trade with Nicaragua implemented by the United States. The Court found that by declaring a general embargo on trade with Nicaragua, the United States had acted in breach of its obligations under the 1956 Treaty of Friendship, Commerce and Navigation between the two countries and was thus under an obligation to make reparation for such breaches. The Court stressed that while, as a matter of principle, "a State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation", however, "where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty". More recently, the Islamic Republic of Iran initiated proceedings before the Court against the United States, alleging violations of the 1955 United States-Iran Treaty of Amity in relation to United States measures targeting Iranian entities, including the Iranian Central Bank.[8]

[7] See Vaughan Lowe and Antonios Tzanakopoulos, "Economic warfare", *Max Planck Encyclopedia of Public International Law*, Rüdiger Wolfrum, ed. (Oxford, Oxford University Press, 2012). See also Daniel H. Joyner, "International legal limits on the ability of States to lawfully impose international economic/financial sanctions", *Economic Sanctions under International Law*, Ali Z. Marossi et Marisa R. Bassett, eds. (The Hague, T. M. C. Asser Press/Springer, 2015).

[8] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986 and *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, application of the Islamic Republic of Iran instituting proceedings, 14 June 2016, available from http://www.icj-cij.org/docket/files/164/19038.pdf. See also Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran. Article IV of the Treaty provides, inter alia, that "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises, shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests, and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws". Article XXI (2) of the Treaty provides that "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means".

I. International responsibility of States

13. States having recourse to unilateral coercive measures without proper justification, notably based on an erroneous unilateral assessment of the existence of an internationally wrongful act by the targeted State, or acting in violation of the procedural and substantive preconditions for recourse to countermeasures, may see their international responsibility engaged.[9] That is an application of the general rule, formulated in article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts according to which: "Every internationally wrongful act of a State entails the international responsibility of that State".

14. In terms of legal consequences, the responsible State "is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[10] The Draft Articles set out the various forms under which reparation can take place:

> "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...".[11]

15. "Restitution", i.e. the action to re-establish the situation which existed before the wrongful act was committed, is the primary form of reparation.[12] However, the State responsible for an internationally wrongful act is also "under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution".[13] Finally, there may be an obligation for the responsible State to give "satisfaction" for the injury caused.[14]

16. There is no reason why those general rules could not be applied to the context of unilateral coercive measures, found to have been taken without proper justification or in violation of substantive or procedural preconditions for recourse to countermeasures. That presupposes that an international court or tribunal, having jurisdiction over disputes such as those arising from the imposition of unilateral coercive measures by virtue of a treaty in force in the relations between the parties (or, in exceptional cases, by virtue of a special agreement between the parties), determines that the unilateral coercive measure in question has entailed a breach of treaty or customary obligations of the targeting State, amounting to an internationally wrongful act, and as a consequence that the State concerned is under

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[9] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 1. Article 2 states that "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State. See also, as regards the international responsibility that may be incurred by international organizations, International Law Commission, draft articles on responsibility of international organizations, with commentaries, in A/66/10 and Add.1.

[10] Ibid., art. 31 (1). Article 31 (2) adds that "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

[11] Ibid., art. 34.

[12] Ibid., art. 35. "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".

[13] Ibid., art. 36 (1). Article 36 (2) states that "The compensation shall cover any financially assessable damage including loss of profits insofar as it is established".

[14] Ibid., art. 37.

an obligation to make reparation. The international court or tribunal concerned is then generally competent to pronounce on the nature or extent of the reparation to be made for the breach of an international obligation. In the case of *Nicaragua v. United States of America*, the International Court of Justice found that the United States was "under an obligation to make reparation" to Nicaragua and further decided "that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court ...".[15]

17. However, as already observed, there may be situations where no treaty is in force in the relations between the targeting and the targeted State, which would arguably provide for the jurisdiction of an international court or tribunal in the event of a dispute related to measures such as the imposition of unilateral coercive measures. The targeted State is then deprived of any opportunity to seek reparation unilaterally before an international court or tribunal. In such situation, the targeted State remains dependent on the willingness of the targeting State(s) to see the lawfulness of its imposition of unilateral coercive measures reviewed by an international court or tribunal, which generally can hardly be expected. Also, more generally it must be noted that there is a mixed record of compliance by States with decisions of the International Court of Justice or of other international courts and tribunals.

2. International responsibility of international organizations

18. It is now well stablished in international law that international organizations may be subject to claims against them based on their unlawful conduct, i.e. for wrongful acts committed in the conduct of their activities,[16] for example if they commit (or contribute to) human rights violations, or harm to the environment.[17] The Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission in 2011 and mirroring the Draft Articles on State Responsibility, make clear that "Every internationally wrongful act of an international organization entails the international responsibility of that organization".[18]

19. The imposition of unilateral coercive measures by international (regional) organizations may thus entail the international responsibility of the latter, e.g. when such unilateral coercive measures are found to violate the principle of non-intervention, which is recognized as part of customary international law and *ius*

[15] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgment of 27 June 1986.

[16] In its advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt, the International Court of Justice clearly stated that "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." See also A/CN.4/532, Alain Pellet, "The definition of responsibility in international law" in *The Law of International Responsibility*, James Crawford, Alain Pellet and Simon Olleson, eds. (Oxford, Oxford University Press, 2010), and C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, Cambridge University Press, 2005).

[17] See Evarist Baimu and Aristeidis Panou, "Responsibility of international organizations and the World Bank Inspection Panel: parallel tracks unlikely to converge?" in *The World Bank Legal Review*, vol. 3, Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury, eds. (Washington, D.C., World Bank, 2011).

[18] Article 3, Draft Articles on the Responsibility of International Organizations, with commentaries (A/66/10).

cogens[19] and explicitly formulated in Article 2, paragraph 7, of the Charter of the United Nations.

20. It may be added that international (regional) organizations should also be considered as bound by relevant norms of human rights law in the context of their sanctions policy. International organizations implementing unilateral coercive measures remain in all cases bound by the obligation to take into account the economic, social and cultural rights of the populations of the targeted country, as set forth in the International Covenant on Economic, Social and Cultural Rights. It was made clear by the Committee on Economic, Social and Cultural Rights in its general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights that any "external entity" applying economic sanctions on a country is under an obligation "'to take steps, individually and through international assistance and cooperation, especially economic and technical' in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country". That applies equally to States and international organizations.[20] It is noteworthy, for example, that with respect to the right to health, recognized in article 12 of the Covenant, in its general comment No. 14 (2000) on the right to the highest attainable standard of health, the Committee highlighted the role of States in their capacity as members of international financial institutions:

> "States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions."

That observation may be transposed to other rights protected under the Covenant[21] and may also be deemed relevant to any international (regional) organizations, i.e. other than international financial institutions.

21. The issue of the potential shared or joint international responsibility and the allocation of responsibility between States and international organizations for unlawful and/or harmful unilateral coercive measures should also be briefly mentioned. The law of international responsibility is obviously relevant to situations where multiple actors (State(s) and/or international organization(s)) contribute to harmful outcomes of the imposition of unilateral coercive measures.[22] As regards, for

[19] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgment of 27 June 1986. See also Philip Kunig, "Intervention, prohibition of" in *Max Planck Encyclopedia of Public International Law*, vol. VI, Rüdiger Wolfrum, ed. (Oxford, Oxford University Press, 2012).

[20] In its general comment No. 8, the Committee stressed that obligations under the Covenant concerned "the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States".

[21] See, for example, Fons Coomans, "Application of the International Covenant on Economic, Social and Cultural Rights in the framework of international organisations" in *Max Planck Yearbook of United Nations Law*, vol. 11, Armin von Bogdandy and Rüdiger Wolfrum, eds. (Leiden/Boston, Brill/Nijhoff, 2007).

[22] On shared responsibility in international law in general, see, for example, André Nollkaemper and Ilias Plakokefalos, eds., *Principles of shared responsibility in international law* (Cambridge, Cambridge University Press, 2014).

example, unilateral coercive measures decided by the European Union and implemented by its member States, it has been suggested that, by virtue of the rule of "dual attribution", "measures imposed by the EU and implemented by EU Member State organs may be attributable also to the acting Member States. If the measures are also in breach of Member States' individual obligations and are not justifiable as countermeasures, they may be challenged before the ICJ as against the acting Member State".[4]

B. Remedies in international human rights law

22. The right to a remedy for violations of international human rights law is enshrined in a number of multilateral instruments.[23] Article 8 of the Universal Declaration of Human Rights provides for a right to "an effective remedy" to everyone whose fundamental rights are violated. A right to a remedy for victims of violations of international human rights law is also found, for example, in article 2 of the International Covenant on Civil and Political Rights, article 39 of the Convention on the Rights of the Child, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

23. Similarly, a right to a remedy is affirmed in regional conventions such as the African Charter on Human and Peoples' Rights (article 7) and the American Convention on Human Rights (article 25). The European Convention for the Protection of Human Rights and Fundamental Freedoms provides for "an effective remedy" for individuals whose rights and freedoms protected under the Convention have been violated.[24]

24. The right to a remedy was reaffirmed by the General Assembly in its resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, of 16 December 2005, which provide, inter alia, that the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes a duty to provide "those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ..., irrespective of who may ultimately be the bearer of responsibility for the violation" and to provide "effective remedies to victims, including reparation".

25. That theoretical (or conceptual) right to a remedy is now increasingly given substance, as it is implemented through procedural mechanisms enabling individuals to complain about violations of their treaty-based human rights committed by States. The Optional Protocols to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have established committees before which individuals can bring such complaints against States. A similar procedure exists under a number of other multilateral instruments, such as the Convention on the Rights of the Child.

[23] See generally Richard Falk, "Reparations, international law, and global justice: a new frontier" in *The Handbook of Reparations* (Oxford, Oxford University Press, 2006) and Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed. (Oxford, Oxford University Press, 2015).

[24] See generally Dinah Shelton, *Remedies in International Human Rights Law*.

26. The regime of recourse to the European Court of Human Rights under the European Convention on Human Rights is also a significant development in terms of access of individuals to remedies for violations of human rights. As regards European Union sanctions, it is also noteworthy that they may be subject in principle to full-scope judicial review, including of their conformity with the fundamental rights recognized in the European Union, before the General Court and on appeal before the European Court of Justice, upon actions initiated by targeted individuals or entities.[25] Faced with an increasing number of challenges to individual sanctions brought by targeted entities or individuals pursuant to the provisions of the Treaty on the Functioning of the European Union, those jurisdictions have developed over time a jurisprudence setting some (mainly procedural) standards for European sanctions to comply with rule of law principles, including due process, even if only partially. That is a very significant first step forward, for which the jurisdictions of the European Union deserve to be commended. The Special Rapporteur is of the view that the system of judicial review of sanctions now applied in the European Union, which is unrivalled worldwide, could usefully be replicated by other States (or groups thereof) emitting sanctions. It is also noteworthy that an action for annulment of European Union restrictive measures against a specific country may in principle be brought before the European Union courts by the Government of a targeted State under article 263 of the Treaty on the Functioning of the European Union, provided that the State concerned establishes that the measure complained of is of direct concern to it.[26] Some weaknesses in the existing system need, however, to be noted. In particular, it remains unclear whether individuals or entities found to have been unlawfully subject to European Union sanctions could be awarded damages before European Union courts (see A/HRC/33/48). The widely applied practice of the Council of the European Union of "re-listing" de-listed individuals or entities on other grounds is also a matter of concern (as well as, in the view of the Special Rapporteur, a challenge to the authority of the European Union courts). Likewise, the pressure put on those courts by some States, which have publicly criticized the de-listing jurisprudence signals that the latter remains a fragile achievement (ibid.).

27. Those mechanisms are of course relevant to complaints brought by victims of human rights violations related to the implementation of unilateral coercive measures. However, the Special Rapporteur has pointed to the limits of the system set by the Optional Protocols to the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, related mainly to the fact that adherence to the Optional Protocols remains voluntary and that the decisions of the committees are not legally binding on States (ibid.). That remains true even if, as has been noted, "once a state is subject to the system, a degree of accountability is generated by publicly measuring the state party's conduct against the international

[25] For precise information on the judicial review of sanctions by the courts of the European Union, see A/HRC/33/48. In the case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, the European Court of Justice affirmed that it must "ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law", Judgment of the Court (Grand Chamber) of 3 September 2008.

[26] See Joël Rideau, "Recours en annulation — conditions de recevabilité", Jurisclasseur Europe Traité (LexisNexis, 2011). At least one case (unrelated to sanctions) has actually been brought by a non-European Union member State, Switzerland, against the European Commission before the European Court of Justice. See case C-547/10P, Judgment of 7 March 2013.

standard and by the attendant pressure on it to comply".[3] The Special Rapporteur has also expressed concern as to the apparent shortcomings of the protection afforded to victims of unilateral coercive measures by the European Court of Human Rights, since it remains unclear whether the Court may be found to have jurisdiction to address claims of violations of the European Convention on Human Rights in relation to the adverse impacts of measures taken by member States of the Council of Europe regarding the human rights of persons or groups living in third countries, as is precisely the case in most sanctions regimes (see A/HRC/33/48).

C. Remedies in international humanitarian law

28. In his first report to the Human Rights Council, the Special Rapporteur referred to several rules of international humanitarian law which may be of relevance in cases of unilateral coercive measures affecting basic human rights or the civilian population at large, for example the ban on collective reprisals (see A/HRC/30/45). It has already been observed by the Office of the United Nations High Commissioner for Human Rights that humanitarian law provisions, such as the prohibition against the starvation of a civilian population as a method of warfare and the obligation to permit the free passage of all consignments of essential foodstuffs and medical supplies, are crucial for the evaluation of economic coercive measures (see A/HRC/19/33). It may be recalled in that respect that a number of scholars have suggested that international humanitarian law (also referred to as the law of armed conflict), or at least principles derived from that body of law, should apply to the imposition of economic sanctions, by States acting both unilaterally and under the authorization of the Security Council, even during peacetime.[27]

29. To the extent that the rules of international humanitarian law may come into play with respect to unilateral coercive measures, it may be thought that remedies generally (or potentially) available to victims of violations of the law of armed conflict may also be relevant to the situation of persons subject to sanctions. That is, however, hypothetical and the Special Rapporteur is not aware of any instance in which remedies for unilateral coercive measures would actually have been sought on the grounds of violations of the law of armed conflict.

30. The right to a remedy for victims of violations of international humanitarian law has been recognized, inter alia, by the Commission on Human Rights and the General Assembly in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law. The Principles have been echoed in a number of international initiatives, including within the International Law Association.[28]

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[27] See W. Michael Reisman and Douglas L. Stevick, "The applicability of international law standards to United Nations economic sanctions programmes", *European Journal of International Law*, vol. 9, No. 1 (1998). For a discussion of that position, see, for example, Daniel H. Joyner, "International legal limits on the ability of States to lawfully impose international economic/financial sanctions" in *Economic Sanctions under International Law*, Ali Z. Marossi et Marisa R. Bassett, eds. (The Hague, T. M. C. Asser Press/Springer, 2015).

[28] See Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law" in *International Review of the Red Cross*, vol. 85, No. 851. See also the Declaration of International Law Principles for Victims of Armed Conflict, adopted by the International Law Association at its seventy-fourth conference in August 2010.

31. As regards procedural mechanisms through which victims of violations of the law of armed conflict may obtain compensation and redress, it may be distinguished between those available at the domestic level and those (potentially) existing at the international level.

32. At the domestic level, the point of departure is that international humanitarian law does not contain an obligation on States to give direct effect in their national legal systems to its provisions, so that the latter cannot in most cases be invoked by individuals before national courts in the same way as domestic rules. Some States give direct effect to provisions of the law of armed conflict, while other States choose to transpose the substance of such law into their domestic law. But, as has been observed "where neither course is adopted, victims are left empty-handed. This seems to be the more common situation worldwide".[29]

33. At the international level, the access of individuals to remedies and redress for violations of international humanitarian law generally requires the consent of the interested State(s) which, as experience shows, is/are generally reluctant to give such consent. Various mechanisms or forums may be considered relevant depending on the particular circumstances, the main forums being international claims commissions, international criminal tribunals (such as the International Criminal Court) and human rights bodies. The role of the International Committee of the Red Cross also needs to be mentioned in that context.

34. The Special Rapporteur wishes to stress that where unilateral coercive measures (of a non-military character) are applied in situations of armed conflict, the provisions of international humanitarian law shall be fully applied to those unilateral coercive measures.

35. In that respect, it needs to be observed that unilateral coercive measures have been applied in several recent armed conflicts, raising concerns in terms of their compliance with international humanitarian law. Those cases include the following:

(a) The blockade imposed on the Gaza Strip by Israel since 2007, which "severely restricts imports and exports abroad and transfers of goods between the West Bank and Gaza and was also explicitly intended to 'reduce the supply of fuel and electricity'", has been found by the Special Rapporteur of the Human Rights Council on the situation of human rights in the Palestinian territories occupied since 1967 to constitute "collective punishment of the people of Gaza, contrary to article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)" (A/70/392).[30] It has been reported recently that the people of Gaza are "kept in a state of de-development by the long-standing blockade", which also has adverse effects on a range of human rights, especially the right to freedom of movement and the right to an adequate standard of living, related notably to a dire lack of potable water and a severely limited electricity supply (see A/HRC/31/73);

(b) The naval blockade imposed on Yemen by the coalition led by the Gulf Cooperation Council since the outset of its military intervention in March 2015, has been reported by the United Nations High Commissioner for Human Rights as

[29] Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law".

[30] The Secretary-General and the High Commissioner for Human Rights have consistently noted that the Israeli blockade of Gaza contravenes international law. See, for example, A/69/347, A/HRC/25/40 and Corr.1 and A/HRC/28/78.

having made dramatically worse an already dire humanitarian situation (see A/HRC/30/31);[31]

(c) The economic sanctions imposed since 2011 on the Syrian Arab Republic are among the main factors that "have seriously impaired the ability of Syrian civilians to earn a living", in addition of course to the ongoing hostilities (see A/HRC/31/68).

IV. Conclusions and recommendations

36. **The Special Rapporteur reiterates his finding, set forth as one outcome of the preliminary research he conducted for the most recent report he submitted to the Human Rights Council, that the review of existing mechanisms that have actually been used (or could arguably be used) to claim for damages for the adverse effects of sanctions points to the fact that such mechanisms are generally few and that their powers to grant effective remedies and damages, including compensation and redress, are most often limited (see A/HRC/33/48).**

37. **Against that background and in light of the findings of the present report, the Special Rapporteur wishes to emphasize again that in each situation around the world where unilateral coercive measures are found to have a negative impact on human rights, the right to a remedy should be effectively available and protected, and appropriate mechanisms at the national or international level should be available for the victims to obtain remedies, compensation and redress. It is definitely not acceptable that the populations of a large number of States are effectively deprived of access to any forum or mechanism before which they could seek remedies, compensation and redress. Such deprivation contravenes some of the basic obligations enshrined in most human rights treaties. The Human Rights Council and the General Assembly should be called to restate in a solemn manner, through a declaration, the right of victims to an effective remedy, including appropriate and effective financial compensation, in all situations where their human rights are adversely impacted by unilateral coercive measures.**

38. **The Special Rapporteur also calls for the international community to take decisive, practical steps aimed at enhancing the existing mechanisms, which allow victims of human rights violations related to unilateral coercive measures to claim for damages and obtain redress. In particular, the committees established under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to hear individual complaints should be reinforced and their competence to address human rights violations through unilateral coercive measures reaffirmed, irrespective of the location of the victim or of the perpetrator.**

39. **The Special Rapporteur has already drawn the attention of the Human Rights Council and the General Assembly to the fact that the first obstacle to a global evaluation of unilateral coercive measures is the unavailability of global**

[31] The report states that "Severe import restrictions, caused mainly by the naval blockade imposed by the coalition forces during the conflict, have also aggravated the humanitarian situation, resulting in fuel scarcity, which adversely affects the distribution of food and water, as well as the functionality of hospitals".

and standardized updated data pertaining thereto (see A/70/345). Measures aimed at ensuring transparency regarding sanctions regimes in force are a prerequisite for the implementation of the right to a remedy for the adverse consequences of unilateral coercive measures on human rights. The Special Rapporteur therefore reiterates that a consolidated central register should be set up, either at the level of the Security Council or the Secretariat, to recapitulate the list of all unilateral coercive measures in force. That register, which would be updated regularly, would be kept according to the standards currently applied for Security Council sanctions and would be made public. Sender/source States or groups of States would be invited to notify the Council of unilateral coercive measures in force on their initiative and of their evolution. The precedent of the United Nations Register of Conventional Arms appears particularly relevant in that context. The register was set up by the General Assembly in resolution 46/36 L, inter alia on account of concerns related to the fact that "arms transfers in all their aspects deserve serious consideration by the international community, inter alia, because of: (a) their potential effects in further destabilizing areas where tension and regional conflict threaten international peace and security and national security; (b) their potentially negative effects on the progress of the peaceful social and economic development of all peoples ...". To the extent that unilateral coercive measures raise similar concerns as regards their adverse impacts on affected countries and the enjoyment of human rights of their populations or segments thereof, it is submitted that the establishment of a similar register of unilateral coercive measures under United Nations supervision would be a major step towards transparency and would arguably contribute to accountability for the adverse effects of unilateral coercive measures.[32]

40. **Other possible steps to be taken, as suggested by the Special Rapporteur in his most recent report to the Human Rights Council (A/HRC/33/48), include:**

(a) **Establishing a mechanism enabling persons affected by unilateral coercive measures to seek remedies, compensation and redress at the level of the United Nations, which could take the form of a compensation commission set up either by the Security Council or by means of a multilateral convention. That would provide a forum through which individuals and entities affected by unilateral coercive measures could bring direct claims against the targeting State(s) or international organization(s). Such a commission could be called to review and adjudicate claims based on human rights violations arising from the imposition of sanctions, or rely upon the findings of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights;**[33]

[32] On a technical level, the Register of Conventional Arms functions as a universal and non-discriminatory register maintained by the Secretary-General at United Nations Headquarters in New York. It includes data on international arms transfers and information provided by Member States on military holdings, procurement through national production and relevant policies. Member States are required to provide the Secretary-General with annual reports on imports and exports of arms. The Secretary-General is required to record that material and to make it available for consultation by Member States at their request.

[33] On the precedent of the Compensation Commission, see, for example, D. Shelton, *Remedies in International Human Rights Law*; Timothy J. Feighery, Christopher S. Gibson and Trevor M. Rajah, eds., *War Reparations and the UN Compensation Commission: Designing Compensation after Conflict* (Oxford, Oxford University Press, 2015); and Veijo Heiskanen, "The United Nations Compensation Commission" *Recueil des Cours: Collected Courses of the Hague Academy of International Law* (2002).

(b) **Borrowing the format of the dispute settlement system of the World Trade Organization to set up an adjudicatory body for addressing requests for compensation and reparation related to violations of human rights resulting from the implementation of unilateral coercive measures;**

(c) **Including in the universal periodic review of each source State an item on the unilateral coercive measures they apply to targeted countries, with an assessment of their human rights impact.**